In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1174

JAMES J. DRISCOLL, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES

After trials by jury in the United States District Court for the District of Massachusetts, each of the petitioners was convicted on one or more counts of willfully failing to pay the special occupational gambling tax prescribed by 26 U.S.C. 4411. Petitioners Driscoll, Geraghty, Maguire and Watson were each sentenced to six months' imprisonment and to pay a $1,500 fine. Petitioner Flaherty was sentenced to three months' imprisonment. The court of appeals affirmed the convictions of Geraghty, Maguire and Watson. It reversed, on account of trial errors, the convictions of Driscoll and Flaherty (Pet. App. 1a–19a).

216-063—66

1. All petitioners contend that 26 U.S.C. 4411 violated their constitutional privilege against self-incrimination. Since this issue is before this Court in *Costello* v. *United States*, No. 826, this Term, certiorari granted, March 21, 1966, we suggest that it would be appropriate to defer action on the instant petition pending disposition of the *Costello* case. This procedure would be warranted even with regard to petitioners Driscoll and Flaherty—against whom there are no outstanding judgments of conviction—because their constitutional claim, if sustained, would bar a second trial.[1]

2. Petitioners Geraghty, Maguire and Watson argue, in addition, that the trial court erred in failing to instruct that they could be convicted of the lesser-included offense of non-willful failure to pay the special occupational tax (D. App. 29, 31).[2] The government's evidence on willfulness showed that a government agent had interviewed each of these petitioners sepa-

[1] We call to the Court's attention, however, the fact that the petition may be untimely with respect to Flaherty. In the *Flaherty* case, the government filed a petition for rehearing in the court of appeals which was denied on February 21, 1966. While it was pending, the other petitioners requested an extension of time to file a petition for a writ of certiorari so that they could file their petition jointly with Flaherty. On February 28, 1966, Mr. Justice Fortas extended their time for filing a petition to and including April 1, 1966. Petitioner Flaherty did not join in the request for an extension. On April 1, a joint petition for a writ of certiorari was filed, more than 30 days after the denial of the petition for rehearing in *Flaherty*.

[2] The record on file with the Clerk consists of the appendices to the briefs filed in the court of appeals in both the *Flaherty* and *Driscoll, et al.* cases. The appendices in the *Driscoll et al.* case are designated herein as "D. App."

rately in 1957. At the interviews, he presented each of them with an affidavit relating to the federal wagering tax law which each read, said he understood, but refused to sign (D. App. 63–64). In 1960 another agent interviewed petitioners Geraghty and Watson and again gave them a similar affidavit. This form advised them that a person must register and pay an occupational tax before engaging in the wagering business. Again, after reading the form, they refused to sign (D. App. 65–67).

A defendant's request for a lesser-included-offense instruction requires the court to make an appraisal of the evidence and determine whether there are "disputed issues of fact which would enable the jury rationally to find" that the defendant has committed the lesser but not the greater offense. *Sansone* v. *United States,* 380 U.S. 343, 351. The court below made such an appraisal and, as to these three petitioners, it could find no such disputed factual issues. The court concluded that the record discloses "no effort to impeach, contradict, or explain" the direct evidence that these petitioners had knowledge of the existence of the federal wagering tax laws (Pet. App. 7a). Under these circumstances, it cannot be said that the jury would have had any rational basis on which to choose between the misdemeanor charged and the claimed lesser offense. See *United States* v. *Markis,* 352 F. 2d 860 (C.A. 2), certiorari pending, No. 848, this Term.

3. The allegations in each count that the petitioners engaged in the wagering business and received wagers on behalf of a person liable for the wagering tax did not render the counts duplicitous. The offense defined in 26 U.S.C. 7203 is the willful failure to pay the re-

quired tax, irrespective of how the duty to pay arises. There is thus no substance to the claim that each count of the indictment charged two crimes.

Respectfully submitted.

THURGOOD MARSHAL,
Solicitor General.

MAY 1966.

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